(4)

No. 87-1383

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the $2000-per-false-claim penalty prescribed by the civil False Claims Act, 31 U.S.C. (1982 ed.) 3729-3731, when applied to a defendant who has already been convicted and punished under the criminal false claims statute (18 U.S.C. 287) for 65 false claims of $9 each, is in effect a criminal penalty prohibited by the Double Jeopardy Clause.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Morris Halper, M.D., was named as a defendant in the government's complaint in the district court, but the complaint was dismissed as against him pursuant to a stipulation. Before the complaint was dismissed as against him, Morris Halper filed a third-party complaint against Robert Halper.

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OPINIONS BELOW

The opinion of the district court declaring the statute unconstitutional as applied (J.S. App. 1a-5a) is reported at 664 F. Supp. 852. A prior, superseded opinion of the district court (J.S. App. 6a-11a) is reported at 660 F. Supp. 531.

JURISDICTION

The judgment of the district court (J.S. App. 12a) was filed on October 21, 1987.[1] A notice of appeal to this

[1] Although the district court issued a later judgment on October 28, 1987, it is the October 21 judgment that constitutes the court's final judgment for purposes of appealing the constitutional holding below. See J.S. 1 n.1; see also *Buchanan* v. *Stanships, Inc.*, No. 87-133 (Mar. 21, 1988).

Court (J.S. App. 13a-14a) was filed on November 19, 1987. On January 13, 1988, Justice Marshall extended the time within which to docket this appeal to and including February 17, 1988. The appeal was docketed on that date, and probable jurisdiction was noted on June 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

31 U.S.C. 3729, before its amendment in 1986, provided in pertinent part:

> A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person and costs of the civil action, if the person—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved; [or]

[2] See J.S. 2 n.2. Although Section 1252 was repealed by Pub. L. No. 100-352, § 1, 102 Stat. 662, which was signed by the President on June 27, 1988, the repeal does not take effect until September 25, 1988 (§ 7, 102 Stat. 664), and "shall not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*).

> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *.

31 U.S.C. (Supp. IV) 3729 provides in pertinent part:

> (a) * * * Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; [or]
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * *.
>
> * * * * *
>
> * * * A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

STATEMENT

1. The civil False Claims Act, 31 U.S.C. 3729-3731, was first enacted in 1863 and signed into law by President Lincoln in an effort to "stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War." *United States* v. *Bornstein*, 423 U.S. 303, 309 (1976); see S. Rep. 99-345, 99th

Cong., 2d Sess. 8 (1986).[3] It is "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, *supra*, at 2; see H.R. Rep. 99-660, 99th Cong., 2d Sess. 18 (1986)). "[T]his statute has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4).

In pertinent part, the statute gives the United States (31 U.S.C. 3730(a)) a civil cause of action against defined classes of persons who seek the payment of false claims by the federal government (see 31 U.S.C. 3729). The version of the statute that was in effect at the time of the false claims in this case provides that, if a defendant is determined to have committed a false claim violation within the meaning of the Act, the government is entitled to recover a civil penalty of $2000 plus double damages and costs. 31 U.S.C. 3729. The $2000-per-claim penalty remained in the statute, unchanged, from 1863 to 1986 (H.R. Rep. 99 660, *supra*, at 17).[4]

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[3] The original False Claims Act, including both criminal and civil provisions, was the Act of Mar. 2, 1863, ch. 67, 12 Stat. 696. It was reenacted as Rev. Stat. §§ 3490-3494, 5438 (1875 ed.). Before 1982, the part of the Act dealing with civil penalties was codified in 31 U.S.C. (1970 ed.) 231 *et seq.*, but the official text of the statute was that which appeared in the Revised Statutes. *Bornstein*, 423 U.S. at 305 n.1. The civil penalties were revised without substantive change, recodified in 31 U.S.C. 3729-3731, and enacted into positive law by the Act of Sept. 13, 1982, Pub. L. No. 97-258, § 1, 96 Stat. 978-979. Those provisions were amended in 1986 (see note 4, *infra*). The criminal provisions of the False Claims Act, as amended, are codified in 18 U.S.C. (& Supp. IV) 287 and 1001. See *Bornstein*, 423 U.S. at 307 n.1.

[4] On October 27, 1986, the President signed into law the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986 Amendments). The 1986 Amendments revise the civil False Claims Act to provide in most instances for a civil penalty of from $5000 to $10,000 plus triple damages and costs. See 31 U.S.C. (Supp. IV) 3729(a). It is the position of the United States that (with limited exceptions) the 1986 Amendments are applicable to all cases pending on their effective date, including cases in which the false claims were made earlier. See *United States* v. *Ettrick Wood Products, Inc.*, 683 F. Supp. 1262, 1264-1268 (W.D. Wis. 1988); *Gravitt* v. *General Electric Co.*, 680 F. Supp. 1162, 1163 (S.D. Ohio 1988), appeal dismissed, No. 88-3171 (6th Cir. May 3, 1988), petition for cert. pending, No. 88-182; *United States* v. *Hill*, 676 F. Supp. 1158, 1165-1172 (N.D. Fla. 1987). But see *United States* v. *Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987). The government did not assert a demand for civil penalties under the amended version of the statute in the present case, however, and accordingly the only question before this Court concerns the constitutionality of the pre-1986 version of the statute.

2. Appellee was the manager of New City Medical Laboratories, Inc. (New City), which provided medical services for patients eligible for benefits under the federal Medicare program (J.S. App. 6a). Providers under that program are entitled to federal reimbursement, at specified rates, for services rendered to Medicare recipients. From about January 1982 to December 1983, appellee submitted 65 different false claims for reimbursement to Blue Cross and Blue Shield of Greater New York (Blue Cross), a fiscal intermediary of the Department of Health and Human Services, which administers the Medicare program (*id.* at 7a).[5] Each of appellee's 65 claims demanded payment of $12 by falsely representing the nature of the service performed; in fact, the service actually performed entitled appellee to reimbursement of only three dollars (*id.* at 7a-8a). Blue Cross was unaware of the

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[5] As the district court noted (J.S. App. 8a), the fact that appellee submitted the false claims to an intermediary rather than directly to the government does not in any way shield him from liability under either the civil or the criminal false claims statute. See *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 541-545 (1943); see also *Bornstein*, 423 U.S. at 309; *Tanner* v. *United States*, No. 86-177 (June 22, 1987), slip op. 21. Congress has now codified this rule. See 31 U.S.C. (Supp. IV) 3729(c); see also S. Rep. 99-345, *supra*, at 21.

misrepresentations, and it paid New City the full amount that it requested (*ibid.*). New City was thus overpaid by a total of $585, an amount ultimately paid by the government.

When the government became aware of his fraud, appellee was indicted (J.A. 7-17) on 65 counts under the criminal false claims statute (18 U.S.C. (1982 ed.) 287), which makes it a crime to "make[] or present[] * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent."[6] On July 9, 1985, appellee was convicted on all 65 counts as well as 16 counts of mail fraud. He was fined $5000 and sentenced to two years' imprisonment. J.A. 18-20.

3. On April 11, 1986, the goverment commenced this civil action against appellee under the civil False Claims Act, 31 U.S.C. 3729-3731 (J.A. 21-27). At the time the action was instituted, that Act provided in pertinent part that a person who "knowingly presents, or causes to be presented [to the government] a false or fraudulent claim for payment or approval," or who "knowingly makes * * * a false * * * statement to get a false or fraudulent claim paid or approved," "is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains * * * and costs of the civil action" (31 U.S.C. 3729(1) and (2)). Because the statute provided for a civil penalty of $2000, the government sought a total civil penalty of

[6] Appellee was charged, tried, and sentenced under the pre-1986 version of this statute. Section 7 of the 1986 Amendments, 100 Stat. 3169, revised the wording of this statute but did not change the substance of the offense. See 18 U.S.C. (Supp. IV) 287.

$130,000, *i.e.*, $2000 for each of appellee's 65 violations.[7] The government also sought double damages ($1170) and costs.

In an initial opinion filed on April 24, 1987, the district court granted summary judgment for the government on the question of appellee's liability (J.S. App. 6a). Noting that appellee's conviction under the criminal false claims statute "necessarily determined" (*id.* at 8a) that he knowingly submitted false claims, the court ruled that appellee was collaterally estopped from denying liability in this civil action. *Id.* at 9a (citing *United States* v. *Thomas*, 709 F.2d 968, 972 (5th Cir. 1983); *Berdick* v. *United States*, 612 F.2d 533, 537 (Ct. Cl. 1979); *Sell* v. *United States*, 336 F.2d 467, 474-475 (10th Cir. 1964)).[8]

The court, however, declined to impose the civil penalty of $130,000 that the government had requested. Stating that "the amount by which the 65 claims were inflated was $9.00 for each claim, or [a total of] $585" (J.S. App. 10a), the court declared that "the total amount necessary to make the Government whole bears no rational relation to the $130,000 penalty the Government seeks" (*ibid.*). The court regarded a civil penalty of $130,000 as disproportionate to appellee's total overbillings, and it suggested that such a penalty would constitute, in effect, a "criminal" punishment (*id.* at 9a, 10a). Because appellee

[7] This Court has indicated that, when a defendant submits several fraudulent demands for payment, in general each individual false payment demand gives rise to a separate false claim violation for purposes of the False Claims Act. *Bornstein*, 423 U.S. at 309 n.4; see *United States* v. *Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988) ("each separate fraudulent submission by a defendant demanding payment from the government is a 'claim' "). See also S. Rep. 99-345, *supra*, at 8, 9; H.R. Rep. 99-660, *supra*, at 21.

[8] Accord, *e.g.*, *Killough*, 848 F.2d at 1528. The new, amended version of the statute contains an explicit collateral estoppel provision. See 31 U.S.C. (Supp. IV) 3731(d).

had already been criminally convicted and sentenced for his commission of the acts on which this civil action is based, the court stated that appellee "would have a valid double jeopardy defense" (*id.* at 10a) if a penalty of $130,000 were imposed in this case.

Apparently because of its double jeopardy concerns, the court construed the statute to mean that "the imposition of a civil penalty of $2,000 for each false claim [is not] mandatory" (J.S. App. 10a). The court then determined that a "civil penalty of $2,000 on 8 of the 65 claims, or $16,000, will reasonably compensate the Government for actual damages as well as expenses incurred in investigating and prosecuting this action" (*ibid.*). Accordingly, the court imposed on appellee a $16,000 civil penalty (*id.* at 11a).

4. The government moved for reconsideration of the district court's decision pursuant to Fed. R. Civ. P. 59(e). The government argued that it was well established that the statute requires a separate civil penalty of $2000 for each false claim and that the court therefore lacked the discretion to award a penalty of less than $130,000 in this case. The court thereupon issued a new opinion and judgment (J.S. App. 1a-5a, 12a), agreeing with the government's statutory interpretation but holding the statute unconstitutional as applied.

The court acknowledged that it had erred in interpreting the statute to allow less than a total civil penalty of $2000 for each statutory infraction (J.S. App. 2a). The court therefore revisited the double jeopardy concerns expressed in its previous opinion. It recognized (J.S. App. 3a-4a, 9a) that in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), this Court had held that the False Claims Act's $2000 penalty provision was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause. The court nevertheless found this case distinguishable on its facts from *Hess*, because "[t]he penalty imposed in

Hess was approximately equal to the actual loss sustained by the government" (J.S. App. 4a). Focusing on a perceived "tremendous disparity between actual damage and the 'civil penalty' in this case" (*ibid.*), the court repeated its earlier statement that a penalty of $130,000 in this case would "bear[] no rational relation to the Government's loss" (*id.* at 5a). The court concluded (*ibid.*):

> [T]he $130,000 penalty sought in this case amounts to a criminal penalty for violations for which Halper has already been punished.
>
> Judgment in this amount would violate the Double Jeopardy Clause. The statute, therefore, is unconstitutional as applied to Halper, and the sought-after relief of $130,000 must be denied.

The court limited the government's recovery to double damages ($1170) and costs, with no civil penalty at all (J.S. App. 5a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court in this case has struck down as unconstitutional the statute that "has been used more than any other in defending the Federal treasury against [fraud]" (S. Rep. 99-345, *supra*, at 4). The district court's holding—that the False Claims Act's civil penalty provision is really a "criminal" penalty provision in the circumstances of this case and therefore violates the Double Jeopardy Clause—is at odds with *United States ex rel. Marcus* v. *Hess*, *supra*, and *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), in which this Court rejected the double jeopardy analysis that the district court adopted here.

The error in the district court's decision is not limited to its inconsistency with this Court's decisions in *Hess* and *Rex Trailer*. The district court's ruling also disregards

Congress's clearly expressed intention that the False Claims Act's "civil penalt[ies]" (31 U.S.C. 3729) are indeed civil, not criminal, for double jeopardy and other purposes. Congress labeled the civil penalties "civil"—both in the pre-1986 version of the statute and in the 1986 Amendments—and the district court erred in upsetting Congress's characterization. The district court's view that the civil penalty in this case is disproportionately harsh also cannot be squared with Congress's determination that even more severe penalties are appropriate.

Finally, the theory embraced by the district court, because it characterizes the False Claims Act's civil penalties as "civil" or "criminal" on a case-by-case basis depending on whether (in the court's view) the penalty is proportionate to the magnitude of the defendant's fraud, would be largely standardless in its application and, if adopted, would lack any semblance of certainty and predictability. If followed, therefore, the district court's view would threaten serious disruption of the False Claims Act's civil enforcement scheme—a scheme that Congress has recently reinforced as "the Government's primary litigative tool for combatting fraud" (S. Rep. 99-345, *supra*, at 2). The district court's amorphous, case-by-case approach to whether the statute's civil penalties are civil or criminal cannot be reconciled with Congress's admonition that "it is important that [the False Claims Act] be an effective tool" (H.R. Rep. 99-660, *supra*, at 18).

For all these reasons, the district court's decision should be reversed. Indeed, the two courts that have addressed the decision below have both concluded that it is incorrect and have declined to follow it. See *United States* v. *Killough*, 848 F.2d 1523, 1534 (11th Cir. 1988); *Scott* v. *Bowen*, 845 F.2d 856, 856 (9th Cir. 1988).

ARGUMENT

THE FALSE CLAIMS ACT'S CIVIL PENALTIES ARE CIVIL RATHER THAN CRIMINAL SANCTIONS.

A. This Court Has Already Decided That The False Claims Act's Civil Penalties Are Civil And That The Size Of The Government's Actual Loss Does Not Affect The Analysis

1. This case is controlled by *United States ex rel. Marcus* v. *Hess, supra*. In *Hess*, various electrical contractors had engaged in a collusive bidding scheme on a federally funded public works project. They were convicted under the criminal false claims statute and fined $54,000 (317 U.S. at 545). An action was then brought against the same contractors under the civil False Claims Act.[9] The complaint sought the imposition of 56 civil penalties of $2000 each, for a total civil penalty of $112,000 (317 U.S. at 540). The defendants asserted that the civil suit was barred by the Double Jeopardy Clause on the ground that imposition of a civil penalty of $112,000 over and above the previous criminal fine would constitute a second criminal punishment for the same conduct (*id.* at 548).

This Court rejected the defendants' argument. The Court began with the premise that jeopardy attaches only in a criminal proceeding (317 U.S. at 549 (quoting *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938)):

> Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for

[9] The civil action was brought by a private party, in the government's name, pursuant to the False Claims Act's qui tam provisions (see 31 U.S.C. 3730(b)).

decision is thus whether [the statute in question] imposes a criminal sanction.

The Court then explained that, unlike the purpose of the criminal false claims statute, which is to punish wrongdoers and "to vindicate public justice" (*Hess*, 317 U.S. at 548-549), "the chief purpose of the [civil False Claims Act] was to provide for restitution to the government of money taken from it by fraud" (*id.* at 551).

The Court acknowledged that, in any particular case, the civil penalty of $2000 might exceed the amount of the fraud actually perpetrated on the government. But the Court emphasized that the statute—especially when considered in light of its criminal counterpart (see 317 U.S. at 549)—was clearly intended to provide a civil remedy, and that "[t]his remedy does not lose the quality of a civil action because more than the precise amount of so-called actual damage is recovered" (*id.* at 550). Stressing that Congress was faced with "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution" (*id.* at 552) to the government, the Court determined that "the instant proceedings are remedial and impose a civil sanction" (*id.* at 549), since "the device of double damages plus a specific sum [*i.e.*, $2000] was chosen [simply] to make sure that the government would be made completely whole" (*id.* at 551-552). The Court concluded, therefore, that there was no merit to the defendants' argument "that the $2,000 'forfeit and pay' provision is 'criminal' rather than 'civil'." (*id.* at 551).[10]

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[10] The phrase "forfeit and pay" came from the language of the version of the civil False Claims Act then in effect, 31 U.S.C. (1940 ed.) 231, which provided that anyone who submits a false claim against the government "shall forfeit and pay to the United States the sum of $2000" plus double damages and costs.

This Court's holding in *Hess* was reiterated 13 years later in *Rex Trailer Co.* v. *United States, supra.* In *Rex Trailer,* the defendant was criminally convicted of using fraud in buying surplus war assets from the government and was fined $25,000 (350 U.S. at 149).[1] After the criminal conviction, the government filed a civil action under the Surplus Property Act of 1944, 50 U.S.C. (1946 ed.) App. 1635, seeking the imposition of five civil penalties of $2000 each based on the same five acts of fraud that gave rise to the criminal proceeding. The defendant asserted that the previous criminal conviction posed a double jeopardy bar to the government's civil penalty proceeding (350 U.S. at 150).

As in *Hess,* this Court rejected the defendant's argument. "The only question for * * * decision," the Court observed, "is whether [the civil penalty provision] is civil or penal" (350 U.S. at 150). Noting that the Surplus Property Act's civil penalty provision was "virtually identical" (*id.* at 152 n.4) to the civil penalty provision in the False Claims Act that was upheld in *Hess,* the Court followed *Hess* and concluded that the $2000 civil penalty provision at issue was civil, not criminal, and therefore did not implicate the Double Jeopardy Clause (*id.* at 152).

The defendant in *Rex Trailer* sought to bolster its argument by using the same theory that the district court employed in the present case: that the penalty was disproportionate to the government's actual loss under the circumstances of that case. Indeed, in *Rex Trailer* the defendant's fraud had not been shown to have resulted in any damages to the government (350 U.S. at 152). The Court rejected this effort to escape from *Hess.* Repeating *Hess*'s admonition that " '[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Congress' " (*ibid.* (quoting *Hess,* 317 U.S. at 552)), the Court explained that the $2000

civil penalty provision was essentially a "liquidated-damage" provision (350 U.S. at 151, 153). The fact that the civil penalty provision effectively served as a liquidated-damages clause, to provide a rough, across-the-board measure of the government's recovery, did not "transform[] what was clearly intended as a civil remedy into a criminal penalty" (*id.* at 154). Cf. *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972).

2. The district court's approach in this case cannot be squared with this Court's explicit rejection of the defendants' double jeopardy arguments in *Hess* and *Rex Trailer*. The district court characterized the False Claims Act's civil penalties as "criminal," but this Court made clear in *Hess*—and again in *Rex Trailer*—that the False Claims Act's civil penalties "are remedial and impose a civil sanction" (317 U.S. at 549). The lower courts have uniformly recognized that holding. See, *e.g.*, *Killough*, 848 F.2d at 1534; *Berdick* v. *United States*, 612 F.2d 533, 538 (Ct. Cl. 1979); *United States* v. *Hughes*, 585 F.2d 284, 287 (7th Cir. 1978); *United States* v. *Grannis*, 172 F.2d 507, 511 (4th Cir.) ("[i]t is clearly established that the defense of double jeopardy is not applicable in civil actions under the federal false claims statute"), cert. denied, 337 U.S. 918 (1949); *First Nat'l Bank* v. *United States*, 117 F. Supp. 486, 489 (N.D. Ala. 1953).

The district court erred in attempting to distinguish *Hess* on the basis of the perceived disproportionality of the penalty in this case. Although "[t]he penalty imposed in *Hess* was approximately equal to the actual loss sustained by the government" (J.S. App. 4a; see *Hess*, 317 U.S. at 540), this Court's decision in *Hess* did not turn on the amount of actual damages inflicted on the government in that particular case.[11]

[11] Justice Frankfurter, in fact, approached the question from a different angle than did the Court precisely because, although the Court's analysis invoked rough notions of proportionality, the Court did not leave open the possibility of proving disproportionality in any particular case. Noting that the majority's approach turned on the distinction between "an extra penalty" and "an indemnity for loss suffered," Justice Frankfurter contended that, "[i]f that is the issue on which the protection against double jeopardy turns, • • • respondents • • • ought to be allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss" (317 U.S. at 554 (concurring opinion)). Although Justice Frankfurter agreed with the majority that such a factual inquiry was unnecessary, he felt that that result should be reached by holding that, regardless of proportionality considerations, "where two • • • proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense" (*id.* at 555).

If *Hess* was not sufficient to make clear that the Court had held the $2000-per-false-claim penalty to be a civil remedy in general, and not just in cases involving demonstrated large losses to the government, then the opinion in *Rex Trailer* cleared away any remaining doubt. The Court in *Rex Trailer* expressly rejected the defendant's double jeopardy argument in the face of a contention that the government had suffered no measurable loss at all: "there is no requirement, statutory or judicial, that specific damages be shown" (350 U.S. at 152).

As the courts have recognized in the wake of *Rex Trailer*, and as Congress has recently reaffirmed, the government is entitled under the False Claims Act to recover a full civil penalty even in cases in which *no* money is paid out and there are *no* measurable damages: "The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages." S. Rep. 99-345, *supra*, at 8; *Killough*, 848 F.2d at 1533-1534 ("[e]ven if no payment [i]s made on a claim or the government cannot prove actual damages, a

forfeiture shall be awarded on each false claim submitted"); *Hughes,* 585 F.2d at 286 n.1 ("[a] false claim is actionable under the [False Claims] Act even though the United States has suffered no measurable damages from the claim"); *Brown* v. *United States,* 524 F.2d 693, 706 (Ct. Cl. 1975) ($2000 civil penalty per false claim is "to be paid whether or not defendant can prove actual damages"); *Toepleman* v. *United States,* 263 F.2d 697, 699 (4th Cir.) ("against this loss the Government may protect itself, though the damage be not explicitly or nicely ascertainable"), cert. denied, 359 U.S. 989 (1959); *United States* v. *CFW Construction Co.,* 649 F. Supp. 616, 618 (D.S.C. 1986) ("a showing of measurable damages to the United States is not an essential element of a cause of action for submission of false claims"), appeal dismissed, 819 F.2d 1139 (4th Cir. 1987).

The foregoing authorities show that the district court erred in relying on the propositions that "[a] penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss" (J.S. App. 5a) and that there are no cases "involving sums that even begin to approach the tremendous disparity between actual damage and the 'civil penalty' in this case" (*id.* at 4a). When the government obtains a $2000 civil penalty (or many such penalties) without sustaining any loss, the ratio between the penalty and the loss is far greater than the 220:1 ratio that the district court mentioned here—the ratio is infinite—yet it is established law that that ratio does not convert the civil penalty into a criminal sanction.

The district court's focus on the 220:1 ratio of civil penalty to actual loss is flawed in another respect. The district court could not have meant to suggest that a single $2000 penalty for a single $9 overcharge would be a criminal penalty. To the contrary, the court initially thought it appropriate to impose eight such penalties and

no penalties for the remaining 57 false claims (J.S. App. 10a). Yet the ratio of one $2000 penalty to one $9 overcharge, eight $2000 penalties to eight $9 overcharges, or 65 $2000 penalties to 65 $9 overcharges is exactly the same. There is no good reason why a statute should be deemed civil when applied to one fraud but criminal when applied to 65 frauds.[12]

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[12] The district court correctly determined in its second opinion that the statute required a $2000 penalty for each of the 65 false claims in this case. It is well established that "the $2,000 penalty for each false claim is mandatory" (J.S. App. 1a-2a). See, *e.g., Killough,* 848 F.2d at 1533; *United States* v. *Hughes,* 585 F.2d 284, 286 (7th Cir. 1978); *Brown* v. *United States,* 524 F.2d 693, 705-706 (Ct. Cl. 1975); *United States* v. *Cato Bros., Inc.,* 273 F.2d 153, 156 (4th Cir. 1959), cert. denied, 362 U.S. 927 (1960); *United States* v. *Diamond,* 657 F. Supp. 1204, 1206 (S.D.N.Y. 1987); *United States* v. *Jacobson,* 467 F. Supp. 507, 508 (S.D.N.Y. 1979). See generally *United States* v. *Bornstein, supra* (reversing court of appeals decision that imposed only one $2000 forfeiture for three separately invoiced shipments of falsely marked tubes). The Senate Judiciary Committee has twice in the last eight years reconfirmed this understanding of the pre-1986 statute (S. Rep. 99-345, *supra,* at 8; S. Rep. 96-615, 96th Cong., 2d Sess. 2 (1980) (emphasis added; footnotes omitted)):

> In its present form, the False Claims Act empowers the United States to recover double damages * * *. In addition, the United States may recover one $2,000 forfeiture for each false claim submitted or for each false document submitted in support of a claim. *The imposition of this forfeiture is automatic and mandatory for each claim which is found to be false.* The United States is entitled to recover such forfeitures solely upon proof that false claims were made, without proof of any damages.

In its initial opinion, the district court ruled that, even though appellee committed 65 false claims violations, the court nevertheless possessed the discretion to impose a total civil penalty in an amount less than $130,000 (J.S. App. 10a). The court relied on *Peterson* v. *Weinberger,* 508 F.2d 45, 55 (5th Cir.), cert. denied, 423 U.S. 830 (1975), and *United States* v. *Greenberg,* 237 F. Supp. 439, 445

The reason why large (even infinite) ratios of penalty to loss in particular cases do not suffice to render the statute criminal is that the statute is designed to recoup various indirect as well as direct costs that the government suffers and to do so by means of a formula rather than by case-specific inquiry. The False Claims Act's "[f]orfeitures and double damages recompense the government for costs of the investigation and litigation as well as the actual monetary damage incurred because of the defendant's fraud" (*Killough*, 848 F.2d at 1534); in fact, the district court itself seems to have acknowledged this point.[13] As this Court has indicated in a related context (see *One Lot Emerald Cut Stones*, 409 U.S. at 237), even when a defendant's false claim nets him little or no gain, the defendant's fraudulent conduct imposes on the government an "extremely costly" burden of investigation and prosecution. See *Mayers* v. *Department of Health &*

(S.D.N.Y. 1965). In its amended opinion holding that the statute requires the imposition of one $2000 civil penalty for each false claim submitted, however, the court correctly noted (J.S. App. 2a) that in both *Peterson* and *Greenberg* the government consented to a cumulative civil penalty amounting to less than one $2000 penalty for each false claim violation. See *Peterson*, 508 F.2d at 55; *Greenberg*, 237 F. Supp. at 445. For that reason, *Peterson* and *Greenberg* are distinguishable. See also *Killough*, 848 F.2d at 1533 (distinguishing *Peterson*); *Diamond*, 657 F. Supp. at 1206 (distinguishing both *Peterson* and *Greenberg*). In our view, *Peterson* and *Greenberg*, to the extent that they suggest the existence of discretion in the courts to impose less than a full $2000-per-claim penalty when the government seeks that full penalty, are also wrong.

[13] The district court recognized in its opinion (J.S. App. 10a) that the civil remedy designed by Congress "must take into account the difficulty in many cases of calculating actual damages and the expense incurred by the Government in discovering the fraud and prosecuting a civil action for damages."

Human Services, 806 F.2d 995, 999 (11th Cir. 1986) (upholding administrative imposition of civil penalty of almost two million dollars in Medicare fraud case brought under the Civil Monetary Penalties Act), cert. denied, No. 86-1887 (Oct. 5, 1987). Thus, the district court erred in dwelling on the government's "actual damage" (J.S. App. 4a), because, "to the Government a false claim, successful or not, is always costly" (*Toepleman*, 263 F.2d at 699). Cf. *Rex Trailer*, 350 U.S. at 153.

A civil penalty of $2000 for a false claim against the government is manifestly reasonable and is well within Congress's legislative power. See *Toepleman*, 263 F.2d at 699 ("[f]or a single false claim $2000 [in 1959 dollars] would not seem exorbitant"); cf. *Hess*, 317 U.S. at 552 (stressing "the inherent difficulty of choosing a proper specific sum which would give full restitution"). This is especially so because that sum was chosen by Congress in 1863 and upheld by this Court in 1943 (*Hess*) and 1956 (*Rex Trailer*)—years when $2000 was a much more princely sum than it is today. See H.R. Rep. 99-660, *supra*, at 17; S. Rep. 96-615, *supra*, at 7 n.11. Moreover, a civil penalty of $2000 serves not only "to make sure that the government would be made completely whole" (*Hess*, 317 U.S. at 551-552) for its losses, but also the additional and wholly legitimate purpose of deterring those who would submit false claims to the government.[14] As this Court wrote in *Hess*, 317 U.S. at 550-551 (citations and footnote omitted):

> Congress might have provided here as it did in the anti-trust laws for recovery of "threefold damages

[14] Cf. H.R. Rep. 99-660, *supra*, at 18 (explaining that one purpose of the 1986 Amendments to the False Claims Act was to bolster the statute's deterrent effect).

> . . . sustained and the cost of suit, including a reasonable attorney's fee." Congress could remain fully in the common law tradition and still provide punitive damages. "By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of civil action and the damages inflicted by way of penalty or punishment given to the party injured." This Court has noted the general practice in state statutes of allowing double or treble or even quadruple damages. Punitive or exemplary damages have been held recoverable under a statute like this which combines provision for criminal punishment with others which afford a civil remedy to the individual injured. The law can provide the same measure of damage for the government as it can for an individual.

See also *Toepleman*, 263 F.2d at 699 ("[w]ithout converting it into a criminal penalty, a statutory forfeiture of money has always been demandable of a wrongdoer by civil process though its purpose and effect be punishment"); *Chapman* v. *United States*, 821 F.2d 523, 528 (10th Cir. 1987). Imposition of a $2000 penalty for each false claim is especially appropriate in the present case given the endemic abuse that plagues government programs such as Medicare (see, *e.g.*, S. Rep. 99-345, *supra*, at 2-4, 21).

In short, the civil penalty in this case is substantial not because Congress has provided for an excessive sanction, but, quite simply, because the defendant has defrauded the government 65 times. "While the total damage award in this action may appear to be excessive, it reaches such proportions for the sole reason that [the defendant] has been found to have submitted [a great many] separate false claims." *United States ex rel. Fahner* v. *Alaska*,

591 F. Supp. 794, 801-802 (N.D. Ill. 1984) (imposing civil penalty in excess of one million dollars for defendant's commission of more than 500 False Claims Act violations). Contrary to the district court's apparent belief, the government's civil remedy is not transformed into a criminal punishment just because appellee cheated the government many times. See *Mayers*, 806 F.2d at 998-999 ($1,791,000 civil penalty for 2702 false claims held not criminal); *Berdick*, 612 F.2d at 538 & n.15 (civil penalty of $72,000 for 36 false claims and total damages of $1545.75); *United States* v. *Diamond*, 657 F. Supp. 1204, 1205-1206 (S.D.N.Y. 1987) (civil penalty of $78,000 for 39 false claims and total fraud of $549.04).

B. Congress's Own Statements Show That The Penalties In The Civil False Claims Act Are Civil

Even if this Court had not already resolved the very question presented in this case, it would be clear that the penalties required by the civil False Claims Act are civil. For "[t]his Court has often stated that the question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States* v. *Ward*, 448 U.S. 242, 248 (1980) (citing *One Lot Emerald Cut Stones*, 409 U.S. at 237; *Helvering* v. *Mitchell*, 303 U.S. at 399). It is not difficult to conclude as a matter of statutory construction that a "civil penalty" statute (31 U.S.C. 3729) is indeed civil. And Congress's recent amendment of the statute buttresses that conclusion in two respects. First, Congress has now raised the civil penalty from $2000 per false claim to "not less than $5,000 and not more than $10,000" per false claim (31 U.S.C. (Supp. IV) 3729(a)). Congress's substantial increase of the statutory penalty weighs against the district court's suggestion that imposition of the preexisting $2000 penalty is so

excessive that it has been shown by "the clearest proof" (*Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), *quoted in Ward*, 448 U.S. at 249) to be criminal rather than civil. Second, in amending the False Claims Act, Congress explicitly reaffirmed that the "civil penalty" provision is intended to be a civil sanction.

1. Congress's own characterization of the civil penalties as "civil" is highly probative. This Court has made clear that when "Congress has indicated an intention to establish a civil penalty" (*United States* v. *Ward*, 448 U.S. at 248) as opposed to a criminal punishment, Congress's intention is entitled to great weight and is controlling unless "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention" (*id.* at 248-249). This Court has admonished, moreover, that "[i]n regard to this latter inquiry, • • • 'only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [it is really a criminal and not a civil provision]' " (*id.* at 249 (quoting *Flemming* v. *Nestor*, 363 U.S. at 617)). Thus, when it is asserted that a statute that Congress has clearly denoted as civil is in reality a criminal statute for one purpose or another, the question is "whether Congress, despite its manifest intention to establish a civil, remedial mechanism, nevertheless provided for sanctions so punitive as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty' " (*Ward*, 448 U.S. at 249 (quoting *Rex Trailer*, 350 U.S. at 154)). See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362-366 (1984) (holding forfeiture proceeding under 18 U.S.C. 924(d) "civil" and rejecting double jeopardy claim); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-237 (1972) (holding forfeiture proceeding under 19 U.S.C. 1497 "civil" and rejecting double jeopardy claim); *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding

Civil Monetary Penalties Law, 42 U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim).

There is no basis in this case for countering the presumption that a statute ordinarily is deemed civil if Congress says it is. Indeed, as this Court indicated in *Hess* (see 317 U.S. at 549), the presumption in this case is particularly strong, not only because Congress has expressly mandated "civil penalties" to be enforced by a "civil action" (31 U.S.C. 3729, 3730(a); see 31 U.S.C. (Supp. IV) 3729(a), 3730(a)), but also because Congress has deliberately provided for a separate criminal analog to the False Claims Act, in 18 U.S.C. 287. "Congress labeled the sanction • • • a 'civil penalty,' a label that takes on added significance given its juxtaposition with the criminal penalties set forth in [another, separate statutory provision]" (*Ward*, 448 U.S. at 249). As this Court stressed in *Hess* (317 U.S. at 549), "[t]he statutes on which this suit rests make elaborate provision both for a criminal punishment and a civil remedy," and "[t]he fact that the [statutory scheme] contains two separate and distinct provisions imposing sanctions [one civil and one criminal], and that these appear in different parts of the statute, helps to make clear the [civil] character of that here invoked" (*Helvering* v. *Mitchell*, 303 U.S. at 404 (footnote omitted)). Since Congress not only has designated the sanctions as "civil" but in addition has specifically set forth an additional, criminal sanction in another, separate statute, the district court erred in "frustrating [Congress's] design" (*One Lot Emerald Cut Stones*, 409 U.S. at 237) by effectively overturning "the congressional classification of the penalty • • • as civil" (*Ward*, 448 U.S. at 250-251). See *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974) (Friendly, J.) ("When Congress has characterized the remedy as civil and the only consequence of a

judgment for the Government is a money penalty, the courts have taken Congress at its word.").[15]

2. Prompted by extensive findings that fraud "permeates generally all Government programs" (S. Rep. 99-345, *supra*, at 2)—including health-care benefit programs (*id.* at 4) such as the Medicare program involved in this case (*id.* at 21)—Congress in 1986 revised the False Claims Act "[i]n order to make the statute a more useful tool against fraud in modern times" (*id.* at 2). Congress determined that "[t]his growing pervasiveness of fraud necessitates modernization of" the Act (S. Rep. 99-345, *supra*, at 2) because "some of the provisions of the Act are outdated" (H.R. Rep. 99-660, *supra*, at 17). In particular (*ibid.*),

> the current law permits the United States to recover double damages plus $2,000 for each false or fraudulent claim. This penalty has not been changed since 1863. The Congressional Research Service has reported that, based on the Consumer Price Index, the buying power of $2,000 in 1863 would be close to $18,000, today.

Thus, emphasizing that it shared "the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments" (S. Rep. 99-345, *supra*, at 17), Congress decided to strengthen the civil penalties that the government is entitled to recover from those who "plunder[] * * * the public treasury" (*United States* v. *McNinch*, 356 U.S. 595, 599 (1958) (footnote omitted)) by making false claims.

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[15] Cf. *Mayers*, 806 F.2d at 998 ("[t]he labelling of the sanction as a 'civil penalty' is determinative of Congressional intent. This is particularly true in light of the name given by Congress to the act—the *Civil* Monetary Penalties & Assessment Act.") (emphasis in original).

The amended version of the statute increased the civil penalty per false claim from $2000 to any amount in the $5000-to-$10,000 range and imposed triple rather than double damages. The legislative history of the amendment makes it clear that Congress strengthened the government's civil remedies because it determined that more severe sanctions were needed in order to stem the tide of rampant fraud inflicted on the government. See H.R. Rep. 99-660, *supra*, at 18 (estimating government's loss to fraud at "hundreds of millions of dollars to more than $50 billion per year"); S. Rep. 99-345, *supra*, at 3 (suggesting larger estimates and noting that "[t]he cost of fraud cannot always be measured in dollars and cents, however").

Given Congress's substantial increase of the amount of the statutory civil penalty, coupled with the legislative determination that the increased amount was necessary to provide the government with an adequate weapon against the "pervasive" fraud in government programs (S. Rep. 99-345, *supra*, at 3), the district court erred by substituting its judgment for that of Congress as to the excessiveness of the smaller, $2000 civil penalties sought in this case. It bears emphasis that, in raising the civil penalty from $2000 per false claim to $5000 to $10,000 per false claim, Congress was aware that the civil penalty would be substantial in cases in which the defendant commits many violations. The Senate report speaks to this very situation (S. Rep. 99-345, *supra*, at 9):

> Each separate * * * "false payment demand" constitutes a separate claim for which a forfeiture shall be imposed * * *, and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable

> for a forfeiture for each such form that contains false entries even though several such forms may be submitted to the fiscal intermediary at one time.

See also H.R. Rep. 99-660, *supra,* at 21. The $2000 civil penalties sought against appellee cannot be viewed as excessive in light of Congress's determination that an even stiffer civil penalty—$5000 to $10,000 per false claim—is appropriate.

Congress's recent amendments not only increased the amount of the civil penalty to which the government is entitled, but they also reaffirmed that the statute's civil penalties are indeed "civil." Referring to Congress's addition to the statute of a provision "to make clear that in civil fraud actions, the Government is required to prove all essential elements of the cause of action [only] by a preponderance of the evidence" (S. Rep. 99-345, *supra,* at 30-31; see 31 U.S.C. (Supp. IV) 3731(c)), the Senate Judiciary Committee emphasized that False Claims Act proceedings are civil in nature (S. Rep. 99-345, *supra,* at 31). The Senate report makes explicit Congress's repudiation of the notion that "the civil False Claims Act is penal in nature" (*ibid.*), and highlights "[t]he Supreme Court's rejection of [that] premise in [*Hess*]" (*ibid.*). Thus, the district court's conclusion that the False Claims Act is criminal in this case contradicts Congress's emphatic reaffirmation that the Act is civil.

Of course, the legislative history of the 1986 Amendments is of limited utility in ascertaining the character of the pre-1986 version of the statute. See *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 734 n.14 (1977). Here, however, the legislative history of the recent amendments serves only to underscore what was already explicit in the very language of the pre-1986

statute, and what this Court has already held in *Hess* and *Rex Trailer*: that the civil False Claims Act's "civil penalty" (31 U.S.C. 3729) is indeed civil and not criminal.[16]

C. The District Court Erred In Adopting A Case-By-Case Approach To Whether The False Claims Act's Civil Penalties Are Civil Or Criminal

Finally, the district court erred in adopting a case-by-case approach to whether the False Claims Act's civil penalties are civil or criminal. The district court's theory that a statute can be "civil" in some cases and "criminal" in others, depending on whether it leads (in the court's view) to a disproportionate sanction, would produce bizarre consequences. Consider, for example, two proceedings both brought under the False Claims Act, one involving a $112,000 penalty for 56 false claims costing the government $100,000 and the other involving a $130,000 penalty for 65 false claims costing the government $585. If the first proceeding is "civil" (following *Hess*) and the second is "criminal" (under the decision below), then in the second case—but not the first—the government would be required to prove its case beyond a reasonable doubt. Conversely, in the first case the defendant would be en-

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[16] Cf. S. Rep. 96-615, 96th Cong., 2d Sess. 2 (1980) ("The proposed legislation is in no sense a 'new' false claims act."). This passage refers to the proposed False Claims Act Amendments of 1980, which were not passed but which were very similar to the amendments that ultimately were enacted in 1986. See S. Rep. 99-345, *supra,* at 13 (discussing the legislation proposed in 1980). The Senate report explaining the 1986 amendments notes that although the proposed 1980 amendments were not passed by the 96th Congress, "[e]vidence of rampant fraud in Government programs since that time has renewed the effort" to update the statute (*ibid.*).

titled to take discovery under the liberal provisions of the Federal Rules of Civil Procedure, but the defendant in the second case would be allowed only the more limited discovery available in criminal cases. Indeed, under the district court's theory a case might proceed to trial as a "civil" case only later to be held "criminal" (and to require more procedural safeguards) if the evidence developed at trial led the district court to question the "proportionality" of the civil penalty or if the court of appeals disagreed with the district court's conclusion that the penalty was not unduly disproportionate.

Thus, under the district court's approach, the government could be placed in the untenable position of bringing an action for civil penalties under the False Claims Act without knowing in advance whether the sanctions sought would ultimately be determined to be civil or criminal. If the government guessed wrong and decided to prosecute under Section 287 first and seek civil penalties later, it would lose the right to those penalties even though there is no inherent reason why the government should not obtain them.[17] Even if the government correctly predicted that the district court would regard the "civil penalties" as criminal sanctions, then the proper procedure would be uncertain. At best, the government might be able to obtain the full penalties that Congress intended by successfully "prosecuting" under the civil False Claims Act in the same proceeding as the Section 287 prosecution.[18] At worst, the

[17] The district court's holding does not stand for the proposition that the Constitution forbids the government to obtain a $130,000 penalty for 65 false claims of $9 each, but only for the proposition that criminal rather than civil procedures govern the government's method of doing so.

[18] Such simultaneous prosecution might be permissible under *Missouri* v. *Hunter*, 459 U.S. 359 (1983), and *Albernaz* v. *United States*, 450 U.S. 333 (1981).

government would be forced to elect between the Section 287 penalties and those provided in Section 3729, or might even be precluded altogether from seeking the Section 3729 penalties, since there is no established criminal procedure for enforcing that statute. No matter what the ultimate resolution of the issues raised by the district court's case-by-case approach, the result would be a haphazard and unpredictable departure from Congress's clear intent.

Depending as it does on the court's view of whether the sanctions prescribed by Congress are disproportionate under the circumstances of the particular case, the district court's theory, if adopted, would be unpredictable and largely standardless in its application, and therefore would seriously frustrate the government's litigative efforts under the civil False Claims Act. The disruption threatened by the district court's view of the statute is at odds with Congress's admonition that "it is important that [the False Claims Act] be an effective tool" (H.R. Rep. 99-660, *supra*, at 18), since it "is used as the primary vehicle by the Government for recouping losses suffered through fraud" (*ibid.*). And the district court's theory, if followed, would hamper the government's ongoing enforcement efforts not only under the False Claims Act, but also under other, similar statutory schemes that provide for civil penalties in addition to criminal sanctions. See, *e.g.*, *Chapman* v. *United States*, 821 F.2d 523, 528-529 (10th Cir. 1987) (holding Civil Monetary Penalties Act, 42 U.S.C. 1320a-7a, "civil" and rejecting double jeopardy claim); *Mayers* v. *Department of Health & Human Services*, 806 F.2d 995, 999 (11th Cir. 1986) (holding same statute "civil"), cert. denied, No. 86-1887 (Oct. 5, 1987); *Scott* v. *Bowen*, 845 F.2d 856, 856 (9th Cir. 1988) (same).[19]

[19] The Civil Monetary Penalties Act, which the courts of appeals in *Scott*, *Chapman*, and *Mayers* held is civil and not criminal, provides

This Court's decisions do not support any such case-by-case analysis of whether a statute is "civil" or "criminal" in nature. To the contrary, once it is established that Congress intended to create a "civil" penalty, this Court "inquire[s] * * * whether the *statutory scheme* [i]s so punitive either in purpose or effect as to negate [Congress's] intention." *Ward*, 448 U.S. at 248-249 (emphasis added). As we have shown, the question whether this statutory scheme is so punitive as to be "criminal" was answered long ago in *Hess* and *Rex Trailer*. See *Rex Trailer*, 350 U.S. at 152 (emphasis added) (*Hess* "held that *the statute involved* was remedial and not penal"); *id.* at 152 n.4 ("*Hess*, hold[s] this provision to provide a compensatory civil remedy"). What is more, the Court's answer has been reaffirmed—emphatically—by Congress in the 1986 amendments. The district court's attempt to fashion a case-specific exception to *Hess* and *Rex Trailer* should be reversed.

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for a "civil money penalty" (42 U.S.C. 1320a-7a) of up to $2000 per claim for certain false claims submitted for reimbursement by the Department of Health and Human Services, and "generally track[s] the civil penalty provision of the False Claims Act." *Griffon* v. *United States Department of Health & Human Services*, 802 F.2d 146, 149-150 (5th Cir. 1986). Another statute that would be jeopardized under the district court's approach is the new Program Fraud Civil Remedies Act of 1986, 31 U.S.C. (Supp. IV) 3801 *et seq.*, which provides for civil penalties of up to $5000.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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